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SOURCE DOCUMENTARY

On file in the CIA Library is a copy of an address delivered by Vahan H Kalenderian at the annual meeting of the International Bar Association at The Hague, August 1948, entitled "Social Legislation Under Islam". Mr Kalenderian attempts to indicate the importance of the study of Islamic law to the nations of the West and to show further that Islam's logical and ethical values form part of a code which is substantially the same as that which prevails in the West. In addition, there is a discussion of the basic concepts of Islamic law.

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Press release

The peace and welfare of the world will be materially advanced if Christian and Mohammedan realize more clearly the great ethical and legal bonds which bind them together in religion and law, according to Vahan H. Kalenderian, member of the New York Bar Association and of the faculty of Columbia University, who will fly to The Hague next week to address the International Bar Association in its annual meeting on the subject: "Islamic Law and Social Legislation." Mr. Kalenderian will continue eastward, via Paris, Rome, Damascus, and Teheran, where he will lecture on political, social, and educational problems common to Near and Middle Eastern nations and the West.

He will take issue with those who count the position of the Mohammedan woman one of degradation, pointing out that early Islamic law protected her in marriage, inheritance, and divorce with a completeness that western law has only recently achieved.

Mr. Kalenderian's good will tour will involve meetings with Near and Middle Eastern diplomats, professors, and students, especially in Iran. His address to the Bar Association will be translated into several languages, including Persian and Arabic.

He is chairman of the Near Eastern Law Committee, International and Comparative Law Section of the American Bar Association; member of the Foreign Law Committee of the Association of the Bar of the City of New York; member of the American Society of International Law; and member of the Council of the American Foreign Law Association.

He will return to teaching and the practice of law in New York City in November.

SOCIAL LEGISLATION UNDER ISLAM

By

VAHAN H. KALENDERIAN

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O' bounteous man, since Heavens sheds over thee
blessings mild,
Inquire, one day at least, how fares misfortune's
child.
What holds in peace this twofold world, let this
twofold sentences show:
"Amity to every friend, courtesy to every foe."

HAFIZ.

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SOCIAL LEGISLATION UNDER ISLAM[1]

I

Why is the study of Islamic law of importance to the nations of the West? Are there ways in which its concepts and practices can exert beneficial influence upon Western culture at the present time? This paper addresses itself to the thesis that a close analysis of Islam's logical and ethical values will reveal a rich, humane, and deeply religious philosophy active among many millions of men on four continents—men whose code is substantially the same as ours, whose partnership in the business of maintaining peace in the twentieth century is necessary for its realization.

Islam is one of the three great monotheistic religious systems along with Judaism and Christianity. It is at the same time one of the four great systems of law along with the Hebraic, the Roman, and the Anglo-Saxon. This dual role fulfilled by an ancient culture suggests in addition a fruitful ground for research for the historian, the theologian, the lawyer, and the sociologist, who may trace original social patterns in pre-Islamic history as well as modern. These in turn, together with their influence upon many aspects of Asiatic, African, and southern European socio-judicial history, may serve to cement cultural bonds between the East and the West, bonds whose potential in the cause of peace and understanding has scarcely been tested. Are these claims too optimistic? Before judging, let us examine the facts beginning with the historical background of pre-Islamic judicial procedure.

Islam, a term which applies equally to Mohammedan religion and law, has endured for 1367 lunar years according to the Mohammedan calendar. The year 622 A. D. marked its origin, the occasion known historically as Hejirah. No native state of importance stood in Arabia at this period.

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[1] An address delivered by Vahan H. Kalenderian at the annual meeting of the International Bar Association at The Hague, August, 1948.

There were only numerous small settlements or tribes. While the empires of Rome and Persia had carved vast spheres of influence for themselves, Mecca was merely the sanctuary of a small group of tribes who brought to it various forms of wealth for trading purposes and offerings. The very obscurity of this small region aided its growth, enabled it to accumulate wealth, and advance its culture.

The social structure of ancient Arabia was knit by ties of blood kinship and a common worship and set of customs. Within the tribal group, however, the individual had little independent recognition. The family or the tribe represented social and legal unity, asserting or defending rights, avenging injury, punishing crime, and inheriting property. And here, as in other primitive communities, God and the worshipping unit were one and the concept was embodied in the continuity of tribe and king. When Islam assumed power in the Arabian communities, this structure was preserved in all essential features, saving only that community of faith was substituted for the tie of blood.

The arrival of Islamism occasioned tremendous reform in this social set-up, for there was much that cried out for improvement. Incest in its most objectionable form was present; sex relations were loose; infanticide, excessive use of spirituous liquors, slavery, blood feuds, and gambling were taken for granted. The women filled degraded roles, for they were chattels. Widows descended by right of inheritance. A daughter could be buried alive.

Those who accepted the tenets of Islam became a brotherhood. Hence, the people of Mohammed, the children of Allah, were in their own eyes a large family held together by their credo and against all others. To them mutual help in all matters was a religious as well as a legal obligation. Islam accepted immediately the hypothesis that equality is a corollary of brotherhood, and equality of men before the law became and is a major premise of Mohammedan religious and legal theory. "Let them all be equal before thee in respect of the justice and tribunal, lest the powerful put their hope in thy partiality, and the

weak despair of their justice." Thus spoke the Islamic law. The head of this community of brethren, this race of equals, was God himself. Since they did not put their judgment before that of God, it followed that if He held them equal, they must so regard each other, differing only in individual qualities, in faith, and in observance of the Divine precepts. God thus personified the principle of unity and order, the supreme power acting in the common interest. Further, *Islam admitted no mediator between the individual and his God.*

II

Islamic law was highly praised by Count Leon Ostorog in his lectures delivered in the University of London:

> "Considered from the point of view of its logical structure, the system is one of rare perfection, and to this day it commands the admiration of the student. Once the dogma of the revelation to the Prophet is admitted as a postulate, it is difficult to find a flaw in the long series of deductions, so unimpeachable do they appear from the point of view of formal logic and of the rules of Arabic grammar. Those Eastern thinkers of the ninth century laid down, on the basis of their theology, the principle of the Rights of Man in those very terms, comprehending the rights of individual liberty, and of inviolability of person and property; described the supreme power in Islam, or Califate, as based on a contract, implying conditions of capacity and performance, and subject to cancellation if the conditions under the contract were not fulfilled; elaborated a law of war of which the humane, chivalrous prescriptions would have put to the blush certain belligerents in the Great War; expounded a doctrine of toleration of non-Moslem creeds so liberal that our West had to wait a thousand years before seeing equivalent principles adopted." *

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* "The Angara Reform", 30-31.

To understand the philosophy governing a system praised so highly it is necessary to understand the Prophet's conception of his office. The connotation of the Arabic for "Prophet" is the English "Apostle." The series of messages delivered by Mohammed to mankind came as divine revelations from God himself. It was Deity speaking through a chosen human. The collection of these is the Koran, or *Qr'an,* "reading." The unity of God is its dominant doctrine. The prophetic function was not to promulgate a new religion, but to revitalize and restore the old. "Say ye: we believe in God and that which hath been sent down to us and that which hath been sent down to Abraham and Isaac and Jacob and the Prophets and that which hath been given to Moses and to Jesus and that which hath been given to the Prophet from the Lord. No difference do we make between them and to God are we resigned." Here then was a broad and explicitly stated assumption of universality and kinship with the rest of humankind.

Thus, the Koran is of the nature of an enabling act, rather than a code of laws. Concerned with the abolition of existing evils, he recognized two general classes. Some were obviously intolerable. For these he pronounced specific legislation. Others, less reprehensible and perhaps more difficult of eradication, received recommendations for their amelioration.

The wisdom of this policy was vindicated by experience. Whenever the prophetic example and precept set a standard too novel or too high, or was unacceptable because inconsistent with customs prevailing where the religion was introduced, the natural tendency was to revert to former practices. Persia, where wine was used and temporary marriages survived, affords striking illustration.

The individual emerged, then, faith replacing consanguinity as the unifying factor, conscious of duties and obligations to himself, his neighbor, his state, and his God. He was receptive to the influence of art and science. While

the rest of Europe was groping through the Dark Ages, the Moorish universities in Spain aided the revival of learning. While the Christian teacher was manipulating the bones of the saints, the Arab physician practised surgery. The schools and monasteries of Italy, France, and Germany were struggling with limited information, when Arab schools were engaged in the study of Aristotle and Plato and stimulated by the works of Ptolemy, Euclid, Galenus, and Hippocrates.

III

Islam provided a rigid spiritual monotheism to replace fetishism and star worship which had prevailed in Central Arabia. The new credo taught resurrection of the dead and future judgment, doctrines which the earlier Meccans apparently ridiculed. The new religion rested upon five pillars: prayer, fasting, pilgrimages, alms, and acceptance of two supreme protestations—"There is no god but God" and "Mohammed is the Apostle of God." Despite the systematic statement of purpose and zeal in gaining adherents, Mu'slims exhibited a tolerant attitude toward other religious and juridical systems, important in the light of their far-flung conquests. The Muslims did not regard their religion as destined for themselves alone. They were dominated by the desire to share its enlightened precepts with all mankind. It was held the business of the faithful to establish the faith wherever their armies marched. Their fervor met unimpeded success. By 653 the Saracen scimitar had brought under its sway an empire as large as that of Rome under the Caesars. Within forty-three years after the Hejirah they had reached the Atlantic; in their fifty-sixth they took Samarkand; Carthage fell in the seventy-fourth and Toledo in the ninety-third. The disarmed and conquered territories were compelled to pay a tax, prove a stable religion, and were in consequence free of further interference. Thus, the use of wine and swine was permitted Christians. Some issues were difficult to reconcile, as that of the admission of testimony of non-Muslims, who could not or would not swear on the Koran.

Let us now examine briefly certain common topics of law in the light of Islamic practice: liberty, property rights, contractual capacity, equality, civil rights and allegiance, and the role of government in men's affairs.

The Muslim jurists conceived and promulgated the principle of liberty within the law; reasoning that liberty unrestrained would result in self-destruction, they concluded that *law is the proper limit, and that this is determined by utility*—the greatest good of the individual or the society. Utility and public welfare were synonymous.

Islam, moreover, asserts that man is endowed with rights as well as duties. Valuable rights included freedom and personal security. Slavery was the exception. The foundling is presumed to be free. A man claimed as a slave was not bound to prove his freedom; the burden rested upon the claimant. The presumption of freedom prevailed in case of doubt. Nor could liberty be disclaimed at will; a spontaneous admission of slavery is legally invalid. Consistent with this philosophy of privilege and obligation, Islamic law favors every practical activity and holds agriculture, commerce, and manual labor in high esteem.

Similar doctrine prevails in the enjoyment of property. The world's goods were created for man's use, and man under natural conditions is entitled to anything that exists. God, by the institution of property, set a limit upon this right, enabling each man to secure the lot assigned to him from the general stock. Earthly goods suggested useful employment by man. Muslim law rejects the *jus utendi et abstandi* of Roman law, and brands as squandering any preemption of unneeded wealth. It insists upon moderation in the use of riches.

Every man is presumed to be endowed with legal capacity and may choose to assume obligations. Restrictions are imposed, for obvious causes, upon the contracts of infants and of persons afflicted with mental disease, or the victims of prodigality, bankruptcy, or illness.

As to property, the owner may not exercise his right for the injury of others without profit to himself, nor when in-

jury will result to others disproportionate with his own benefit. "The science of law," says Abu Hanifa, "is the knowledge of the rights and duties whereby man is enabled to observe right conduct in the world and prepare himself for the future life." Jurisprudence is thus a fusion of law and theology.

Equality is a corollary of the brotherhood of faith. "The white man is not above the black, nor the black above the yellow; all men are equal before their Maker," and this principle was proclaimed and practiced when almost unrecognized in Christian society. Now equality is a personal relationship. Consequently, Moslems must keep their pledges. The principle of good faith derives from the affirmation of equality. A spirit of compromise and conciliation dominates Islamic law in controversy on property, reprisal being expressly forbidden. Abuses are exemplified and prohibited—power of attorney may not be given to an enemy of the defendant; a beast of burden may not be rented to a cruel man; a slave girl may not be sold to a libertine.

Islamic law agreed with Blackstone that it was not the privilege of the subject to renounce sovereignty. Hence apostasy and treason were synonymous. Non-Muslims were accordingly denied the right of inheritance on the ground that they were treasonable elements. But anyone who professed the unity of God and the prophetic character of Mohammed was a Muslim in good standing, whether he achieved his status by birth or conversion.

The ruler or the head of the state is a trustee under Muslim law. He cannot substitute his own authority for traditional law, though he may prefer one of the accepted systems. He may favor certain customs so that eventually they gain the status of law, and he has all the rights of a modern fiduciary in guarding the interests of his beneficiary.

The sovereign is an integer of law. According to Muslim precepts, God completed the legal edifice by establishing a ruler, Imam or Calif, to whom He enjoined obedience.

However, no man as such is entitled to rule over his fellow beings. Every form of authority, the relation of father and children, guardian and ward, master and servant, master and slave, ruler and subject, has no other foundation than the will of God. Homage, though, is a religious duty. The headship may only be held by one at a time, and he must be endowed with moral and physical qualities necessary to his office. A Calif or an Imam cannot be a slave, since, if he cannot freely dispose of himself, he cannot exercise independent authority. He must be male, have legal capacity, that is puberty and sanity, physical integrity, wisdom and courage essential to defense in peace and in war, of the interests entrusted. His life must conform with the divine precepts. Finally, he must be a descendant of the family of Junahash, the tribe to which the Prophet belonged.

The elective body is made up of those who by culture, rank, morality, and experience in worldly affairs, are suited to be judges. This electorate is entrusted to the men of the "Pen and the Sword," the civil and military notables, and to them is given power both to "bind and to loose," that is, to stipulate the bond on which rests the princely power, and the obedience due from, and in the name of, the whole community. Election is an offer (*iqad*) which, if accepted, becomes a binding contract (*aqd*). By his investiture, the Calif or Imam binds himself to exercise his power within the limits laid down by divine law; he must provide for the temporal interests of Islam, the protection of the frontier, the conduct of war against unbelievers, internal security, management of public property, and the administration of justice.

The Califate is then a public trust, having as its object the service, the protection, and the enforcement of the holy law. Like a shepherd, the Caliph embodies in his person the unity of the flock. He is a trustee, and his actions derive their legitimacy from the principle that a prince must seek the welfare of the community. The people, in turn, are bound to follow and obey their chief. Tradition says that "Whosoever rebels against the Imam rebels against God."

IV

Law, (*Shar*), under Islam is the will of God, unlike our concept, that of a code or standard approved by the people, directly or through their respective governments, deriving its authority from the reason, will and moral nature of men. Submission to *Shar* is a social as well as a religious duty. Justice, order, religion, law, and morals are aspects of the same will.

The Koran is in a sense a chart for living. It is the original source of Islamic law in point of time as in sublime authority. It is the recognition of the supremacy of law, confirmed by the Prophet himself. It is recorded that "The Prophet said, 'that which the Prophet of God had made unlawful is like what God had made so.'" "I am no more than man, but when I enjoin anything respecting religion, receive it, and when I order anything about the affairs of the world, than I am nothing more than man." And again: "My words are not contrary to the words of God, but the word of God can contradict mine."

The Hadith or traditional standards fall into three categories: First, traditions of what the Prophet did himself *Sunna;* second, of that which he enjoined by words; and third, of that which was done in his presence without his disapproval. (The third must have consisted largely of the customs and usages of pre-Islamic Arabs.)

The basic concepts in law, then, stem from four sources—the Koran, and the body of Prophetic traditions; the Consensus, (*Ijma*), or authoritative pronouncements of the Prophet's advisory council; analogies, (*Quyas*), or laws emanating from majority opinion among the Doctors in cases where the Koran, Traditions, and Consensus, were inadequate. The *Quyas* were of course derived by analogical reasoning. Legal codes were compiled on these bases in the second and third Islamic centuries to treat of civil and criminal jurisprudence and religious ritual. Reliance upon Prophetic word or tradition was very great; when Ma'adi was preparing to visit Yemen, the Prophet asked

the grounds upon which he would make decisions. "I will judge them according to the Book of God," was the reply. "But if that contains nothing to the purpose?" "Then," was the response, "upon the practice of the Prophet." But if that also fails you?" "Then I will make an effort to form my own judgment."

Theological and juristic authority appear divided into two schools, *Shiahs* and *Sunni*. The former contend that leadership of the faithful descended by right legal to Ali on the death of Mohammed and remains immemorially vested in the descendants of Ali and Fatima. The *Sunni*, whose name derives from *Sunnah*, (practice or law), favored the elective procedure, the first successor to Mohammed having been so determined. Important influence upon the development of jurisprudence and social legislation has come from these two schools. For the Shiites accept only those traditions handed down by Ali and his immediate descendants—those who had seen the Prophet and held familiar intercourse with him. The *Sunnis* accepted the traditions in their entirety, including decisions of successive Califs as supplementary to Koranic text. In the final analysis, therefore, these distinctions were political and dynastic.

The law as determined by these standards was supplemented by reference to local custom and usage, or the civil law. "Customary law" was distinguished by the jurists from the *Shar*. It found little place in the legal treatises of early jurists and theologians, except in Persia, where the customary law was known as *Urf* and was extensively applied by the civil judges. Whenever it was at variance with the *Shar*, however, the latter prevailed. This toleration in matters of religion and law is exemplified in the persistence of many Zoroastrian practises in Persia, where also the Lunar calendar is disregarded, as is the Muslim New Year.

Three other modes of reasoning merit attention, as illustrative of juristic evolution. The first was adopted by Imam Abu Hanifa for relief from absolute logical depend-

ence. As a corrective he conceived *Istihsan,* which means "approbation," "liberal construction," or "juristic preference." The term was used to express the liberty of pronouncing such a rule as the circumstances required.

Hanifa was a Persian, and the usage of Medina had little interest for him. He used few traditions, preferring to extract from the Koran, by reason, the rule applicable to the immediate case and suited to a variety of needs, even though strict analogy indicated otherwise. His system was of the nature of legal fiction, resulting in the application of law in a sense undreamed by its original exponent. It was not developed by the exigencies of actual issues, but was the product of beneficent casuistry. Hanifa endeavored to construct a code which would resolve every conceivable question. This has tended to broaden and humanize Islamic law.

Abbasides allied themselves with this school, because its philosophical breadth and casuistical potentialities commended themselves. Later the Ottoman Turks accepted it.

Malik Abu Anas, 94-179 A. D., also perceived the necessity for a surer instrument than analogy. He proposed the use of *Istislah*—"Seeking Peace," or "Amending,"—and held that knowledge was the appropriate means of legal development. If the rule indicated by analogy is inconsistent with actuality, resort should be to amendment. By this process the jurist could avail himself of the powers Hanifa advocated, but would be restricted in two directions. The rule of law deduced by analogy might not be disregarded at the whim of the individual exponent or with reference to the particular circumstances. It could be superseded only if its application would work a general injury, or be contrary to the public welfare. The concept of public interest thus made its appearance in legal decisions.

The third mode of reasoning, *Ijtihad,* has gained respect almost equal to that accorded the four primary foundations. *Ijtihad* means "Laboring hard," or "Studying intensely to arrive at a sound opinion or judgment." The

authority of the *Mujtahids,* "The One who studies or labors hard", is not based on his holding any office in the state, but upon his theological and juristic reputation and piety.

The law developed further through the wide discretion permitted to the *Gazis* and *Muftis* in its administration. The *Fatawas*, or decisions of the great Muslim judges, are illustrations of its exercise. They settled points regarding which authoritative tradition afforded no guidance, and their decisions are comparable with the *responsa prudentium* of Roman law. The power of theoretical exposition confided in the canonists through the development of *Sunni* law did not extend to the conscience of the faithful. The canons of the *Shar* were expounded by the head of the priesthood, known in Persia as *Mosh ta hed,* and in the former Ottoman Empire as *Sheik-ul-Islam.*

Islamic law, through its eventual development, is adaptable to almost every conceivable exigency. Its extraordinary flexibility has its analogy in the language of its expression. Arabic is unrivaled as a vehicle of ideas.

V

What about the rights and duties of women in Mohammedan countries? What provision did the law offer for their comfort and protection? The general supposition of the West is that women occupied an unenviable position in the family and community. A recourse to the records of law refute this false assumption. Let us consider briefly the questions of marriage, dower, divorce, legal rights and disabilities, and relation to and control of children.

A woman under Islamic law, occupies a position of peculiar privilege. So long as she is unmarried, she remains under the parental roof; and until she attains her majority, she is, to some extent, under her father's, or his representative's control. So soon as she is of age, however, the law vests in her all the rights of an independent person. She is entitled to share with her brothers in her parents' estate. The proportion may be different, but the disparity is regulated by a just appraisal.

The contract of marriage gives the man no power over the woman's person beyond what the law defines, and none whatever over her property. Her existence does not merge with that of her husband. She remains an individual. No doctrine of coverture is recognized; her property remains her own. She may sue her debtors, without joining a next friend or under cover of her husband's name. She may be sued as a *femme sole.* She can receive property without the intervention of trustees. She has a lien upon her husband's estate for her ante-nuptial settlement. Her individual earnings cannot be wasted by a prodigal husband, nor can she be ill-treated with impunity. She may alienate or devise her property without her husband's leave. She can enter into binding contracts with her husband, and proceed against him in law for their enforcement. She may act as administratrix or executrix, or be appointed a *Mutwallieh,* or trustee of a charitable foundation.

She continues to exercise, after she has passed from her father's house into her husband's home, all the rights which the law gives to men. All her privileges as woman, wife, and mother are secured to her, not by grace, nor by judicial caprice, but by the actual text of the law.

Marriage is a social duty expressed in a civil contract. Its essentials are proposal and acceptance. The parties should understand the contract clearly. If *sui juris,* they should actually consent to its provisions. The husband and wife should be carefully identified. Among the *Sunnis* the presence of witnesses is considered necessary, but any irregularity resulting from their absence is remedied by consummation.

A valid marriage requires that there shall be a consideration moving from the husband in favor of the wife, for her exclusive benefit. This is called *mahr* or *sadak* in legal treatises, and *dain mahr,* or dower debt, in common parlance.

The *mahr* is similar in its legal incidents to the Roman *donatio propert nuptias.* It is a settlement in favor of the

wife made prior to and in consideration of the completion of the marriage contract. The essential difference between the two is that the Roman *donatio* is voluntary, whereas the *mahr* is obligatory.

A stipulation by the woman before marriage to abandon her right to dower is inoperative, for the wife would still be entitled to the customary dower. She may, after marriage, discharge the husband of his liability, or make over any property she may have received from him in its satisfaction. Its amount is regulated by the parties' social standards.

The *Shiah Shara'ya* says: "There is no limit either to the maximum or the minimum of dower," it being a matter of contract between husband and wife.

The parties retain their personal rights against each other and against third parties; and, according to most of the schools, have power to dissolve the marriage tie should circumstances render this desirable.

The prohibited degrees are more numerous, but exhibit somewhat the same characteristics as the *Code Civile*. The prohibitions fall under four heads: absolute, relative, prohibitive, and directory.

a. Absolute prohibitions apply to legitimate and illegitimate blood relationship, alliance or affinity or fosterage.

b. Relative prohibitions apply to conditions which, until removed, render the marriage invalid. Upon their subsequent removal the union becomes automatically lawful *ab initio*.

c. Prohibitive incapacity exists where the woman is already the wife of another man.

d. Directory prohibitions apply where a woman is pregnant by her previous husband or master.

The power of the father to impose the status of marriage on his minor children is recognized. It is known as *jabr* and conceded with various modifications by all the schools.

The power of the father to give his children in marriage without their consent may be exercised in the case of sons until they have attained puberty, which is presumed, in the absence of evidence to the contrary, upon the completion of the fifteenth year.

An infant is incompetent to enter into a marriage contract without the guardian's consent, though a marriage contracted by a minor who is possessed of understanding may be ratified by the guardian or the person who stands *in loco parentis.* After the age of fifteen every contract of marriage entered into on behalf of a youth or girl is dependent upon his express consent; and, among the *Hanafis* and *Shiahs,* the children of both sexes, upon attaining majority, are free to contract marriages.

"It is not lawful for a guardian," says the *Hedaya,* "to force an adult virgin into marriage. None, not even a father nor the sovereign, can lawfully contract a woman in marriage who is adult and of sound mind without her consent, whether she be a virgin or not."

Though the right of *jabr* is theoretically absolute, there are numerous restrictions upon its exercise. The father may not marry his child to one who is diseased, or to slaves, idiots, and other ineligibles. If he should agree on behalf of his minor son to pay a dower in excess of the infant's means, or of the wife's proper dower, or marry him to a woman of low position, the marriage would be similarly invalid. Nor may the father arbitrarily refuse consent to the marriage of his children. Any paternal act prejudicial to the infant's interests is illegal and warrants judicial interference to arrest its execution or to decree its annulment.

The husband's responsibility for his wife's maintenance arises when the contract takes effect, and the wife is thereby subjected to marital control. It continues during the union, and in certain cases, for a time following its dissolution. None is due under an invalid marriage, and the responsibility ceases upon a wife's refusal of cohabitation.

The *Shara'ya* enunciates the principle that "there is no difference in the right of a wife to maintenance whether she be a Mosleman or Zimmia, free or bond."

A wife is bound to live with her husband and to accompany him wherever he may go. The law, however, recognizes circumstances justifying a wife's refusal to fulfil this obligation, such as habitual ill-treatment, desertion over a long period, direction to leave his house, or the husband's connivance in her doing so.

Temporary marriages are regarded as lawful by the *Akhbari Shiahs.* This institution prevailed among the Sabeans and Zoroastrians from early times and seems to have persisted after their conversion to Islam, despite the Prophet's prohibition. Such marriages are known as *muta'a,* and are contracted for a fixed period, long or short. The *Sunnis* and the *M'utazilas* regard such unions as invalid.

The peculiar terms of declaration of temporary marriage are "I have united myself to thee" and "I have married thee."

Though not prohibited, marriage of a fatherless virgin in the *muta'a* form is declared abominable. "If", says the *Shara-ya,* "one should do so, he should refrain from connubial intercourse." Such a marriage is to her prejudice, and, lacking paternal guidance, she should not be subjected to its degradation. Specification of dower is necessary, and the period must be fixed. The *Shara'ya* states the indispensable conditions:

(a) When term and dower have both been mentioned, the contract is valid; but if there is no mention of dower, while the term is provided, the contract is void; but if the term is omitted and the dower is provided, the contract, though void as a *muta'a,* is valid as a permanent marriage.

(b) Every condition must be mentioned, including proposal and acceptance. No effect can be given to any antecedent stipulation, unless incorporated in the contract; neither can any subsequent provision.

(c) An adult and discreet female may contract herself in a *muta'a* marriage, and her guardian may not object, whether she be a virgin or not.

(d) A woman so married may not be divorced, but the parties become absolutely separated upon the expiration of the prescribed term.

(e) A temporary contract of marriage creates no right of inheritance in either party.

The children born of such a union are legitimate, and inherit from their parents as in the case of a permanent marriage.

Mohammed's reforms marked a new departure from Eastern customs affecting divorce. He restrained the husbands' power, and gave women the right to obtain a separation on reasonable grounds. Toward the close of his life he practically forbade its exercise by men without arbitral or judicial intervention. He pronounced "*talak*" to be the most detestable of all permitted things before Almighty God, since it prevented conjugal happiness and interfered with the proper rearing of children.

When the wife, owing to aversion to her husband, or her unwillingness to fulfill her conjugal duties, desires to obtain a divorce, she may obtain release from the marital contract by surrendering her dower, or some other property. Such a divorce is called "*khula.*" When a divorce is effected by consent of both parties, it is called "*mubarat,*" and operates as a mutual release and discharge.

According to both *Sunni* and *Shiah* schools, when the married parties have no cause of complaint, other than mutual aversion due to incompatibility or other conditions, they may dissolve the marriage tie by agreement. When the husband is guilty of such conduct as makes the matrimonial life intolerable—when he neglects to perform his lawful duties, or fails to fulfil his contractual obligations, or where there is insanity, or impotency existing prior to marriage and incurable, the wife may present her complaint to the *Kazi* or Judge, who has jurisdiction to grant the decree.

VI

Mohammed declared the maintenance of children a paternal obligation. *Hedaya* declares that "the maintenance of minor children rests on their father, and no person can be his associate or partner in furnishing it." Debts incurred by any person on their behalf are recoverable from him. Difference of faith between father and child has no effect upon the obligation. Correspondingly, the Prophet directed that when their parents were infirm and old, and unable to support themselves, the children should provide for them. He required respect and consideration for fathers and mothers with the admonition that "a respectful and obedient child shall attain to heaven in the footsteps of its mother."

The paternal responsibility and correlative authority derive from considerations of the children's benefit. When tenderness of age or weakness of sex indicate the need of care, the mother's superior right to their custody is asserted; and only her own misconduct can deprive her of the privilege. When the children are no longer dependent, the father has the right to their charge and education, and the guardianship of their persons.

Among the *Shiahs,* the mother is entitled to the custody of her children without distinction of sex until they are weaned, which is limited to two years.

After the child has been weaned, its custody, if a male, devolves upon the father, and, if a female, upon the mother. The mother's custody of a female child continues to her seventh year. The father then becomes entitled to custody, but may allow the mother to retain the custody of children of both sexes beyond the periods mentioned.

The consensus of all civilized systems is that a child's paternity, born in lawful wedlock, is presumed to be in the mother's husband, without any affirmation or acknowledgment by him. "The child follows the bed." The husband

has the right of disavowal on the ground of inability of access. Islamic law favors the usual presumption strongly. According to the *Sunni* schools, it is so strong, that where a child is born six months from the date of marriage, or within two years after dissolution of the contract, a simple denial of paternity by the husband will not destroy the status. The *Fatawai "Alamgiri"* holds that paternity does not admit of positive proof because the connection of a child with its father is secret. It may be established by the father's word or by a legally constituted relation between the parents.

There are three degrees in the proof of paternity—the first is a valid marriage; the second an invalid marriage which may come within the purview of one that is valid; and the third, bondage.

The effect of the first is to establish paternity without a claim, and to prevent its rejection by mere denial, though in the case of a valid marriage it may be rejected by *l'aan* or imprecation, but not where the marriage is invalid.

The *Shiahs* upon the basis of a decision pronounced by Ali during his Caliphate, recognize ten lunar months as the ordinary period of gestation. They hold that in order that ascription shall arise independently of acknowledgment, the birth of the child must be at least six months from the consummation of the marriage. They agree with the *Sunnis* that when the child is born in circumstances which give rise to the natural presumption of legitimacy, nothing short of a proceeding in which the husband and wife are put on their oaths, can affect the status.

Mohammed's solicitude for minor children is exemplified by many portions of Koranic text. The duties, responsibilities, and ethical standards of guardians are enumerated in careful detail. The Book records: "Restore to the orphans when they come of age, their substance; do not substitute bad for good, nor devour their substance by adding it to your own, for this is an enormous crime."

VII

Because pre-Islamic Arabia was a parental despotism, based upon the idea of a joint family system of birthright, no distinction existed between inherited or acquired property. Sons at birth received a vested interest in their father's estate. Females could neither inherit nor dispose of property. They were themselves bought and sold in marriage and were inherited by their male relatives. Children belonged to the owners of mothers. Distribution was *per capita*, not *per stirpes*. Boys below the age of puberty could not inherit, nor could they defend a potential inheritance.

Mohammed achieved these reforms: infants were no longer disqualified; adoption and brotherhood by oath, a legal fiction, were ruled illegal.

Trusts, or *wakfs*, had long been a concern of custom and law among the Mohammedan peoples. They were of three classes, private, public, and quasi-public. Trusts could be established only for the good of mankind. Those designed for the sole worship of God were denied on the ground that a close tie ought to exist between a producing good and the people whom God intended should benefit. *Wakaf* means literally "I have bound up or detained." Establishment of a trust for the founder, his children, relatives, or the poor, was an act of piety and as such encouraged. It could be for a person or a class or for an unborn child. The founder, of course, was obliged to divest himself of all title in the property settled. He was often the guardian of the goods thus dedicated. He could thus provide for his family from generation to generation. By it he could evade the strict letter of the law of inheritance and thus prevent subdivision of his property. He also secured a defence against future obligations, spendthrift successors, and despotic government, all under the aegis of religious sanction and approval.

These, then, are some of the chief general and specific items of Islamic law and social legislation which defined

the relation of religion and law to the government and to the family and individual. Upon them rest the foundations of Islamic society today in large measure and understanding of them and their application is a necessary corollary to the culture and mind of the Mohammedan.

VIII

Let me close with some emphatic references to certain historical prejudices which have unfortunately colored our Western concept of Islam. Few histories reveal the wholesome and ethical force which Islam represented in contrast to the moral and intellectual bankruptcy which characterized Europe after the fall of Rome in 410 A. D. Africa was no better, displaying vice, feuds, disorganization, polytheism, idolatry, and barbaric social customs. To these people Islam offered a new way of life, offered, it is true, upon the choice of the scimitar or the Koran, but a way infinitely better than the one prevailing. Standards of justice, mercy, and equality were preached with a force not hitherto encountered. It is unfortunate that the West's knowledge of Islam came through the Crusades, which an impartial historian must admit resulted in part from economic and political motives. And it is further unfortunate that to many in Europe and America the Ottoman Turks, who used the religion solely as an imperial lever, represent the total of Mohammedans. To these people religion was a garb, to be discarded at will, an instrument of degradation, cruel oppression of Christian and other non-Turkish Muslim subjects. The unhappily prevailing understanding of Islam, which ignores its vital and ethical force in society, thus stems from Turkish abuse of the religion and should be discounted as such.

To the scholar who has studied the points of contact between Christianity and Islam where both are fairly represented, many points of strong similarity are evident. Both faiths urge belief in a merciful God and are founded on the idea of the brotherhood of man and upon faith in

God and man. The cyclonic impact of the Crusades, approached by both sides with emotion rather than just consideration of claims and compromises, defeated re-approachment between these two constructive forces for nearly a thousand years. If each had met the other with understanding instead of hatred, with cooperation instead of destruction, with thoughts of unity instead of division, this historic contact might have fused intellectual and moral forces which would have dominated two civilizations by spiritual rather than material forces. The Mohammedan's reverent research in the glories of Greece, in mathematics and natural science, so ably represented in the flowering of universities such as Valladolid and Salamanca during the Moorish period in Spain, might have been shared with an intellectually and spiritually hungry Europe. It would then have been spared the formalism of the Middle Ages and the excesses it entailed.

Is it too late to realize the advantages of such a spiritual and intellectual union in the interests of peace and the advancement of man? I do not believe so. A few decades only separate us from the new millennium. The essential and basic postulates of Islam and Christianity still exist and hold common treasure. A democratic world, respecting the rights of the individual, cannot ignore any portion of itself which reveres and practices brotherhood, faith, and equality in human worth. Both religions as well as the legal codes they endorse have many dormant forces. Islam is a dominant faith, with adherents in every land and upon all continents. I believe that the dawning era will record upon the pages of history a universal and progressive recognition of our common humanity—and that Islam and Christianity will labor hand in hand in the writing of these pages.

The Mohammedans have a phrase which occurs often in every day speech which expresses the faith and hope of right-thinking men everywhere—*Inshallah*—"If God wills."